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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-360

WILLIAM FRIEDLANDER - - - Petitioner

Versus

KENTUCKY BAR ASSOCIATION - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
315 West Main Street
Frankfort, Kentucky 40601
Counsel for Respondent

September 23, 1976.

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OPINION BELOW

The opinion of the Supreme Court of Kentucky (Petition, Appendix, pp. 1a-5a) is reported in 536 S.W. 2d 454 (Ky. 1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association and the Supreme Court of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law under the

Fourteenth Amendment of the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Supreme Court of Kentucky.

RULES INVOLVED

Rules of Supreme Court of Kentucky (RAP) Concerning Procedures in Disciplinary Cases

1.280 *When granted.* Oral arguments will be heard on motion of either party or on the Court's own motion in such cases as the Court may believe an oral argument will materially contribute to a proper decision.

3.300 ***Rights of Respondent Against Whom A Charge has been Filed.*** The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.330 *Order of Proceedings and Burden of Proof.* The Trial Committee shall determine and

regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Committee, the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings, the burden shall rest upon the applicant. Before submission the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee, there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

3.380 *Degrees of Discipline.* Upon finding by the Board of guilt or unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or by the Court, under RAP 3.320, or upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

. . . . nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statutes

30.170 *Court rules governing practice of law and state Bar*

(1) The Court of Appeals [now called Supreme Court of Kentucky] shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form or its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a

deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

STATEMENT OF THE CASE

On February 4, 1974, a charge alleging unprofessional and unethical conduct was filed against William Friedlander by the Kentucky Bar Association. The charge stated that during 1973, the law firm of Friedlander, Webb and Belknap was the sole owner and operator of Kentucky Insured Title Company (hereinafter referred to as KITC). William Friedlander's firm's practice was limited almost solely to real estate law. KITC received and placed in its escrow account some $135,076.49 from Kentucky Mortgage Company (hereinafter referred to as KMC) on or about July 25, 1973. The funds were received during the course of William Friedlander's representation of the sponsor of an apartment structure in Paducah, Kentucky. KMC gave directions for the distribution of these funds to Seth E. Giem (the contractor) and General Insurance Company of America in the amount of $109,851.69 and to Kentucky Mortgage Investors in the amount of $8,757.70. William Friedlander issued or caused to be issued checks in the stated amounts to said payees on the escrow account of KITC. Both checks were twice returned unpaid on the escrow account because of insufficient funds.

After petitioner filed a timely answer to the charge, trial hearings were held on June 18, 1974, and June 27, 1974. During these due process hearings a transcript of evidence was developed. (RAP 3.300). Briefs were filed before the trial committee and became a part of the record.

On April 18, 1975, the trial committee filed its

report making advisory findings of fact, conclusions and recommendations. Three members of the committee recommended a finding of guilty as charged; two members recommended a period of suspension from practice of one year, and one member recommended a private or public reprimand. On July 19, 1975, the Board of Governors of the Kentucky Bar Association made an advisory finding on the entire record that petitioner was guilty as charged by a vote of 12-2; and by a vote of 11-3, recommended disbarment from practice in the Commonwealth to the Supreme Court of Kentucky. On August 14, 1975, petitioner was served with a rule to show cause why he should not be disciplined for unprofessional conduct and was furnished a copy of the report of the trial committee and the order of the Board of Governors. A timely response to the rule and a supporting brief were filed by petitioner. Respondent filed its brief and the Supreme Court of Kentucky took the case under submission. Petitioner filed no motion for an oral argument although RAP 1.280 provides for oral arguments.

On January 23, 1976, the Supreme Court of Kentucky rendered a per curiam opinion citing the fact petitioner admitted that he participated in the use of trust funds from the escrow account of KITC for the benefit of his law firm and ordered him permanently disbarred from the practice of law. On February 19, 1976, petitioner filed in the Supreme Court of Kentucky a petition for rehearing which was subsequently denied on June 11, 1976.

ARGUMENT

The issues raised by the petitioner in his Petition

for Writ of Certiorari concern the constitutionality of the procedures utilized by the Supreme Court of Kentucky in disciplining its officers.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I.

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by petitioner in his petition for rehearing before the Supreme Court of Kentucky were whether or not the disciplinary proceedings by the Kentucky Bar Association and Supreme Court were conducted in such a way as to deny him rights of procedural due process under the Fourteenth Amendment of the United States Constitution. The court in its per curiam opinion clearly based its decision on independent and substantial non-federal grounds.

Under the Rules of the Supreme Court of Kentucky and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved and confirmed their advisory findings. (Petition, Appendix, p. 5a). The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The state court has clearly stated this position in *Kentucky Bar Association v. Stivers,* Ky., 475 S.W.

2d 900, cert. denied, 406 U.S. 968 (1972), stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken; The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904)
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> * * *
>
> "But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904)
>
> * * *
>
> "In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904)

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the trial committee concerning recommended discipline. Its judgment concerning factual issues agreed with the recommendations of the trial committee and the Board.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Supreme Court of Kentucky. There were no federal issues to be decided

since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

After firmly placing its opinion on uncontroverted facts found in the record formed by the trial committee at a due process hearing and so admitted by petitioner, the court then found from a record devoid of factual defenses that petitioner had misappropriated trust monies citing the court's recent opinion in the analogous cases of *Kentucky Bar Association v. Tucker,* 535 S.W. 2d 97, cert. denied, 46 L. Ed. 644 (1975) and *Kentucky Bar Association v. Collis,* 535 S.W. 2d 95, cert. denied, 46 L. Ed. 637 (1975).

The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Supreme Court of Kentucky clearly reveals that the results reached in this case by the Supreme Court of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Supreme Court of Kentucky and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Supreme Court of Kentucky and the sound standards of conduct applied to those facts by the court.

II.

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY

BAR ASSOCIATION AND THE SUPREME COURT OF KENTUCKY DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner states on page 12 of his petition that *In re Ruffalo,* 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This court had before it the state proceeding but denied the Petition for Writ of Certiorari. *Ruffalo v. Mahoning County Bar Association,* Ohio, 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections or even granted a Petition for Writ of Certiorari based on a state disciplinary proceeding, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures.

It is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young University, Provo, Utah, September 5, 1975.

A. **There is no Denial of Due Process Where a Lawyer is Not Given Any Opportunity for a Hearing and Oral Arguments Before the Board of Governors.**

Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designated and commissioned by the Chief Justice of the Supreme Court of Kentucky to try the issues in the proceeding although he disagrees with the introduction of two items of evidence. (Petition, page 9). As noted before, the Supreme Court of Kentucky found petitioner guilty from his own testimony and ignoring all other evidence present in the record. (Petition, Appendix, pp. 2a-3a).

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Supreme Court of Kentucky, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, a complaint was filed and investigated. Matters of severe unprofessional conduct were disclosed. Notice was given of the complaint and a timely response was filed. The Inquiry Tribunal, appointed by the Chief Justice of the Supreme Court of Kentucky, reviewed the complaint and response and determined that probable cause existed to conclude that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charge and filed a timely answer thereto. A full due process hearing was held in a "de novo" climate. The

advisory trial committee report, the charge, the answer, and transcript of proceedings before the trial committee with briefs were reviewed by the Board of Governors without the presence of counsel on either side. The following order apears in the Board's minutes of July 19, 1975:

> "The President excused from the room all persons whose presence was not authorized pursuant to the Rules as they relate to the consideration of disciplinary cases. In Executive Session, the Board considered the charge against William Friedlander." (Petition, Appendix, p. 13a).

The Board of Governors had three alternatives: dismiss the charge, issue a private reprimand, or recommend public discipline to the Supreme Court of Kentucky. If the first two alternatives had been exercised, the case would have terminated without any detriment to the petitioner and the Board's sole function as a "screening device" would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to *recommend* to the Supreme Court of Kentucky discipline in the form of disbarment. At that point, a possible point of detriment to petitioner, the court issued a rule to show cause submitting to petitioner the advisory trial committee report and order of the Board. Petitioner at that point, again, had an opportunity to file a response to the rule and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Supreme Court of Kentucky was rendered, petitioner exercised his rights to file a petition for rehearing wherein new issues were presented to the court. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible

due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Supreme Court of Kentucky.

The disciplinary proceedings of the Supreme Court of Kentucky are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962).

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device." A charge can be dismissed by the Board, however, *no* public discipline can be ordered so there is *no final* action taken by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the record produced at the due process hearing. The use of this "screening device" is based on state law and raises no

federal due process issue. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 30.170) and inherent power of the Supreme Court of Kentucky (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary file and has the opportunity to respond to a rule to show cause and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the trial committee and the Board or the court in this case. Two members of the trial committee recommend a one-year suspension period by the state court. Had the "Board" step of the proceeding been eliminated, the case would have gone to the Supreme Court of Kentucky for determination of factual matters and the degree of discipline to be ordered. There is only an issue raised by the Board's order as to the degree of discipline to be ordered. The Board recommended disbarment. The Board's recommendation is supported by the cases of *Kentucky Bar Association v. Collis* and *Kentucky Bar Association v. Tucker*, cited above. Had the trial committee known what the state court was to hold in these cases it is submitted that all three members of the trial committee would have recommended disbarment. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The tests of *Willner v. Committee on Character*, 373 U.S. 96, 105 (1963) and *Morgan v. United States*, 298 U.S. 468 (1936), are sustained by Kentucky disciplinary rules. The factual situation in *Southern Railway*

Company v. Virginia, 290 U.S. 190 (1933) cited by petitioner at page 14 of the petition has no application to this case. Petitioner had notice, in fact, answered as fully as he could before the Inquiry Tribunal, the trial committee and the court before final discipline was ordered. He was also heard before the court on a petition for rehearing. There was no rule that prohibited petitioner from requesting an oral argument before the court. Petitioner never moved the court for an oral argument.

B. **The Absence of a Full Factual Inquiry Before the Justices of the Supreme Court of Kentucky in Person Where the Court Judges all Factual Issues Does Not Deny Due Process.**

The aforesaid issue was not raised before the Supreme Court of Kentucky and is, therefore, not properly before this Court; however, the issue will be discussed.

The Supreme Court of Kentucky did give weight to the findings of the trial committee and the Board of Governors. The court made the same finding as the two lower bodies in relation to the checks given on behalf of a client and returned because of "insufficient funds." The court stated it drew no inference in stating the funds had been converted to petitioner's own use. The record is void of any evidence whatsoever showing this was not the case. The clients' funds were not intact. Disbarment results under that fact situation. This case is not unlike the case of *Kentucky Bar Association v. Judy Ward Smith*, Ky., 492 S.W. 2d 880, cert. denied, 414 U.S. 859 (1973), where the state court, exercising its fact finding authority, found from the record that Ms. Smith was guilty of various crimes and perjury at the trial hearing from the tran-

script formed before the trial committee and disbarred her even though she was given no hearing in these "new findings" before the court. This Court denied her Petition for Writ of Certiorari when the Kentucky court's action was challenged.

Petitioner argues that there is a de novo proceeding before the Supreme Court of Kentucky. This is not an accurate statement. The court must and in this case did make its findings from petitioner's own testimony in the record produced at a full due process hearing. In no way was this hearing's product reduced to insignificance before the Supreme Court of Kentucky. Only the degree of discipline imposed was increased from the recommendation of the trial committee. This due process hearing was further reinforced by a rule to show cause before the state court together with a petition for rehearing. The *Willner* case is certainly not the key to this case. (Petition, p. 16). As stated by petitioner, the New York Appellate Division relied on an *inadequate* report of a committee on character and fitness in a bar admissions case where the committee held no due process hearing. Petitioner admits a full due process hearing before the trial committee. The product of this hearing formed the record before the Supreme Court of Kentucky: a complete, accurate and fair record. Petitioner at all stages of response answered as fully as he could to all allegations of the charge. The petition for reheaing permitted the state court to correct any error it may have made in its opinion. There were no errors. No corrections needed to be made.

No Kentucky lawyer is disbarred before the Supreme Court of Kentucky without first having his due process rights fully protected by the rules of that

court. Full constitutional safeguards are given a lawyer.

Before this Court petitioner, for the first time, poses the argument that where the Supreme Court of Kentucky is the court of original jurisdiction it is a denial of equal protection and due process to deny the right of appeal to attorneys although every other litigant in Kentucky is permitted an appeal as a matter of right. This novel argument was not made before the state court; therfore, it is not properly before this Court and cannot be considered. The obvious answer to this issue is that equal protection is in fact given to every attorney under Rule 3 of the Supreme Court of Kentucky. All are treated the same. Needless to say, there can be no appeal from the highest court in the state of Kentucky when the original action is in that court. The only reason for an appeal in the state court system is to permit a review by a higher state court. Petitioner's argument has no merit whatsoever.

III.

THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT.

The Per Curiam Opinion of the Supreme Court of Kentucky is based soundly on facts in the record before it. The court considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A fair reading of the record supports the entire opinion of the court. The opinion clearly cites the evidence it found in the record to support its findings. The court applied a clear standard to the facts citing the public peril resulting from petitioner's actions and its grave effect on the image of the bench and

bar. Disbarment is the only responsible action the Supreme Court of Kentucky could take to protect the public from the gross, dishonest conduct of petitioner.

On November 11, 1969, by RAP 3.130, the Kentucky Court of Appeals (now the Supreme Court of Kentucky) adopted the American Bar Association Code of Professional Responsibility as a sound standard of conduct required of lawyers and that charges can be preferred where those standards are not met. The following provisions of the Code have obviously been breached by petitioner:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty . . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

EC 9-5 of the Code states:

> Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

This Court has made clear the strong state interest of state courts in setting standards of conduct for and disciplining its members in the recent case of *Goldfarb v. Virginia State Bar, et al.*, 95 S. Ct. 2004 (1975) at p. 2016, when it stated:

> "'We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that

in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 336, 72 S. Ct. 690, 697, 96 L. Ed. 978 (1952), see also *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L. Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida*, 373 U.S. 379, 383, 83 S. Ct. 1322, 1325, 10 L. Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U.S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1962); *Law Students Research Council v. Wadmand*, 401 U.S. 154, 157, 91 S. Ct. 720, 723, 27 L. Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

If the Supreme Court of Kentucky gave little significance to the petitioner's evidence, it was due to the lack of credibility of the evidence and not due to an oversight on the part of the court. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

Petitioner states that although RAP 3.330 states that "the burden of proof shall rest on the association in disciplinary proceedings and the facts must be proven by a preponderance of evidence," the test should be "beyond a reasonable doubt" because Kentucky disciplinary proceedings are "quasi-criminal." This issue

was not raised before the state court and cannot be considered, however, the issue will be discussed. Kentucky disciplinary proceedings are civil by nature as a matter of sound state law. *Commonwealth ex rel. Buckingham v. Ward*, Ky., 267 Ky. 677 (1937). This Court has never reversed a state court disciplinary action because it was a civil proceeding. The issue is really moot in Kentucky since the Supreme Court of Kentucky has held that it is probable each justice applies the "beyond reasonable doubt test" anyway. *Kentucky Bar Association v. Franklin*, 534 S.W. 2d 459 at 463 (1976). In the case at bar, petitioner was found guilty beyond any doubt on his own testimony stating guilt as charged. The trial committee, the Board of Governors and the state court all made the same findings of fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

LESLIE G. WHITMER
Director-Counsel
Kentucky Bar Association
315 West Main Street
Frankfort, Kentucky 40601
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1976, I served on Thomas L. Hogan and Robert E. Delehanty, Suite 401, 701 West Walnut Street, Louisville, Kentucky 40203, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer

LESLIE G. WHITMER